

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 43-81

WILLIAM M. CONVERSE, affiliated)
with the INTERNATIONAL ASSOCIATION)
OF FIREFIGHTERS, Local No. 436,)
Complainant,)
vs.)
ANACONDA-DEER LODGE COUNTY,)
Defendant.)

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 44-81:

JAMES F. FORSMAN, affiliated with)
the INTERNATIONAL ASSOCIATION OF)
FIREFIGHTERS, Local No. 436,) ORDER
Complainant,)
vs.)
ANACONDA-DEER LODGE COUNTY,)
Defendant.)

On December 2, 1981, the above-captioned complainants filed unfair labor practice charges with the Board of Personnel Appeals against the above-captioned defendant. On December 16, 1981, the defendant filed an answer to the charges. The answer denied the charges and among other affirmative defenses alleged that the contractual grievance procedure had not been followed and alleged that it "is therefore presumed [that the complainants] have abandoned [their] position[s]."

On February 22, 1982, the defendant filed a motion to dismiss the charges. As authority for the motion to dismiss, the defendant cited "Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971) and ULP 13-78 designated AFSCME v. The City of Laurel."

On March 12, 1982, the complainants filed a memorandum in

1 opposition to motion to dismiss. In this memorandum, the complainants
2 assert the following: (1) The Board of Personnel Appeals
3 does not have authority to implement the Collyer policy to Montana
4 public sector labor relations. (2) Even if the Board of Personnel
5 Appeals does have authority to implement Collyer, Collyer is
6 inapplicable to the facts of this case.

7 Before we address the complainants two problems, we should
8 first point out that if the Board of Personnel Appeals defers to
9 arbitration pursuant to a contract, the Board of Personnel Appeals
10 would not dismiss the unfair labor practice charges but instead
11 would retain jurisdiction of the charges for purposes of insuring
12 that arbitration in fact takes place and to determine whether the
13 arbitration procedures were conducted fairly. Thus the defendant's
14 motion to dismiss will not be granted even if the Board of Personnel
15 Appeals does defer to arbitration.

16 THE BOARD OF PERSONNEL APPEALS DOES HAVE AUTHORITY TO IMPLEMENT
17 THE COLLYER DEFERRAL POLICY.

18 While this order will not minutely detail the Board of Personnel
19 Appeals' authority to implement the Collyer policy for Montana
20 public sector labor relations, we note the following three points.

21 First the Montana Supreme Court, when called upon to interpret
22 the Collective Bargaining for Public Employees Act, 39-31-101
23 through 39-31-409, MCA, has consistently turned to National Labor
24 Relations Board (NLRB) precedent for guidance. State Department of
25 Highways v. Public Employees Craft Council, 165 Mont. 349, 529
26 P.2d 785 (1974); AFSCME local 2390 v. City of Billings, _____
27 Mont. _____, 555 P.2d 507, 93 LRRM 2753 (1976); The State of
28 Montana, ex. rel., The Board of Personnel Appeals v. The District
29 Court of the Eleventh Judicial District, _____ Mont. _____, 598
30 P.2d 1117, 36 St. Rpt. 1531 (1979)). Teamsters Local #45 v. Board
31 of Personnel Appeals and Stuart Thomas McCarvel, _____ MT _____,
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1 grievance and disputes arising thereunder, "as a substitute
2 for industrial strife," contribute significantly to the
3 attainment of this statutory objective." [emphasis supplied.]

4 Collyer, supra, 77 LRRM at
5 1934 - 1935.

6 Third, the courts of appeals have upheld the Board's Collyer
7 doctrine each time the issue has been presented. Electrical
8 Workers (IBEW) Local 2188 v. NLRB (Western Elec. Co.) 494 F 2d
9 1087, 85 LRRM 2576 (CA DC), cert. denied, 419 US 835, 87 LRRM 2398
10 (1974); Associated Press v. NLRB, 492 F 2d 662, 85 LRRM 2440 (CA
11 DC. (1974) (listing in its Footnote 6 courts which have given
12 "apparent approval" to Collyer without directly passing on it);
13 Provision House Workers v. NLRB (Urban Patman, Inc.), 493 F 2d
14 1249, 85 LRRM 2863 (CA9), cert. denied, 419 US 828, 87 LRRM 2397
15 (1974) (deferral appropriate even though "characterization of the
16 dispute as one involving interpretation of a contract rather than
17 existence of a contract, is not wholly free from doubt."); Nabisco,
18 Inc. v. NLRB, 479 F 2d 770, 83 LRRM 2612 (CA 2, 1973). The Second
19 Circuit has declared that "[t]he validity of the Collyer doctrine
20 is no longer seriously in doubt." Machinists Lodge 700 v. NLRB,
21 525 F 2d 237, 239, 90 LRRM 2922 (CA 2, 1975).

22 As the Second Circuit Court of Appeals also stated in the
23 Machinists Lodge case, supra,

24 As mentioned at the outset, this Court has held that the
25 Board has wide discretion to "decline to exercise its authority
26 if to do so will serve the fundamental aims of the [National
27 Labor Relations] Act." Nabisco, Inc. v. N.L.R.B. at 2614;
28 quoting International Harvester Co., Indianapolis Works, 138
29 NLRB 923, 925-26, 51 LRRM 1155 (1962); See Carey v. Westing-
30 house Corp., 375 U.S. 261, 55 LRRM 2042 (1964), which also
31 quoted favorably from the same passage in International
32

1 Harvester. Our task is thus to determine whether or not it
2 was an abuse of the Board's discretion to determine that
3 deferral to arbitration here furthered the fundamental aims
4 of the NLRA.

5 It is, of course, well settled that there is strong
6 Congressional policy encouraging arbitration of labor disputes.
7 It has also been said that "the fostering of one policy may
8 be detrimental to another policy, viz.: that expressed by the
9 Congress in granting the Board power to remedy unfair labor
10 practices." Local Union No. 2188, Int. Bro. of Elec. Wkrs.,
11 v. N.L.R.B., 494 F.2d 1087, 1090, 85 LRRM 2576, 2578-2579
12 (D.C. Cir., 1974). We must remember, however, that both of
13 these policies are merely means toward the end of promoting
14 labor peace.

15 Machinists Lodge, supra, 90 LRRM
16 at 2927. (Citations omitted.)

17 COLLYER IS APPLICABLE TO THE FACTS OF THIS CASE.

18 In support of their contentions that Collyer is not appropri-
19 ate for this case, the complainants cite General American Trans. Corp.,
20 NLRB, 94 LRRM 1483 (1977) and Roy Robinson Chevrolet, NLRB, 94
21 LRRM 1474 (1977).

22 In General American Trans. Corp., supra, the NLRB held that
23 they would not defer to arbitration in cases involving an alleged
24 violation of 8(a)(1) & 8(a)(3) of the NLRA. In Roy Robinson,
25 supra, the NLRB found that no independent violation of 8(a)(1) or
26 8(a)(3) of the Act was alleged in the complaint or found by the
27 Administrative Law Judge. 94 LRRM at 1477.

28 The charges filed by the complainants allege certain facts
29 and at the end of the complaint allege a general violation by the
30 defendant of subsections 1, 2, 3 & 5 of 39-31-401, MCA. The facts
31 alleged in the charges would indicate a possible violation of
32

1 Section 11 of the collective bargaining agreement, which incorporates
2 by reference 7-33-4125, MCA. This is a possible violation of
3 39-31-401(5).

4 The alleged facts do not, however, indicate an independent
5 violation of 39-31-401(1) or (3). Absent specific allegations of
6 fact supporting a violation of sections 39-31-401(1) or (3), MCA,
7 the Board of Personnel Appeals can defer under the Collyer policy.

8 Since 1971, the determination as to whether to defer alleged
9 violations of Section 8(a)(5)¹ to arbitration has revolved around
10 the factors which were relied upon by the NLRB majority to justify
11 deferral in the Collyer case itself.

12 The dispute must arise within the confines of a stable collective
13 bargaining relationship, without any assertion of enmity by the
14 respondent toward the charging party. The NLRB applies its "usual
15 deferral policies" if:

16 . . .there is effective dispute-solving machinery available,
17 and if the combination of past and presently alleged misconduct
18 does not appear to be of such character as to render the use
of that machinery unpromising or futile. . .²

19 Using this criteria, the NLRB has declined to defer to arbi-
20 tration when such circumstances as these have existed: (1) the
21 unfair labor practice charge alleged that there was no stable
22 collective bargaining relationship, (2) the respondent's conduct
23 constituted a rejection of the principles of collective bargaining
24 or the organizational rights of employees, (3) the unfair labor
25 practice charge alleged that the employer's conduct was in retali-
26 ation or reprisal for an employee's resort to the grievance proce-
27 dure or otherwise struck at the foundation of the grievance and

28
29 1. "It shall be an unfair labor practice for an employer to refuse to bargain
30 collectively with the representatives of his employees, subject to the provisions
of Section 9(a)."

31 2. United Aircraft Corp., 204 NLRB 879, 83 LRRM 1411 (1972).

1 labor practice charge, and has moved to defer to arbitra-
2 tion pursuant to Collyer, it is assumed that the respondent
3 is willing to arbitrate this issue and to waive the
4 procedural defense that the grievance is not timely
5 filed.

6 4. The issue in dispute is covered by the collective bargain-
7 ing agreement between the parties to this matter (1980-81
8 contract, section 11). That collective bargaining
9 agreement contains a grievance procedure which culminates
10 in final and binding arbitration (1980-82 contract,
11 Section 24). Therefore the dispute is clearly arbitrable.

12 5. The dispute clearly centers on the interpretation or
13 application of Section 11 of the 1980-82 collective
14 bargaining agreement.

15 6. The dispute is eminently suited to the arbitral process,
16 and resolution of the contract issue by an arbitrator
17 will probably dispose of the unfair labor practice
18 issue.

19 The Board clearly has the authority to hear this complaint
20 under the provisions of 39-31-403, MCA. However, it is determined
21 that the policies and provisions of the Act⁷ would best be effectuated
22 if this Board were to remand this complaint to the grievance-
23

24
25 ⁷ Specifically, 39-31-101 and 39-31-306, MCA. Section 39-31-101, MCA, provides
26 as follows:

27 Policy. In order to promote public business by removing certain recognized
28 sources of strife and unrest, it is the policy of the state of Montana to
29 encourage the practice and procedure of collective bargaining to arrive at
30 friendly adjustment of all disputes between public employers and their employees.

31 Section 39-31-306, MCA, provides in pertinent part as follows:

32 (2) An agreement may contain a grievance procedure culminating in final and
binding arbitration of unresolved grievances and disputed interpretations of
agreements.

(3) An agreement between the public employer and a labor organization shall be
valid and enforced under its terms when entered into in accordance with the
provisions of this act and signed. . .

1 arbitration procedure specified by the collective bargaining
2 agreement of the parties.

3 IT IS THEREFORE ORDERED that this Complaint be remanded to
4 the grievance-arbitration procedure outlined in the collective
5 bargaining agreement between the parties to this matter.

6 The respondent will, within ten days of receipt of this
7 Order, file a written statement with this Board indicating that it
8 is willing to arbitrate this issue and to waive the procedural
9 defense that this grievance is not timely filed.

10 The parties will then process this grievance in accordance
11 with the procedures outlined in Section 24 of the 1980-2 contract.

12 This Board retains jurisdiction for the purpose of hearing
13 this complaint as an unfair labor practice charge if:
14

- 15 1. the respondent does not, within ten days of receipt of
16 this Order, file a written statement with this Board
17 indicating that it is willing to arbitrate this issue
18 and to waive the procedural defense that this grievance
19 is not timely filed;
- 20 2. an appropriate and timely motion adequately demonstrates
21 that this dispute has not, with reasonable promptness
22 after the issuance of this order, been resolved in the
23 grievance procedure or by arbitration; or
- 24 3. an appropriate and timely motion adequately demonstrates
25 that the grievance or arbitration procedures were not
26 conducted fairly.

27
28 DATED this _____ day of April, 1982.
29

30 BOARD OF PERSONNEL APPEALS

31 By _____
32 Robert R. Jensen
Administrator

1 arbitration mechanism, (4) the employer had interfered with the
2 use of the grievance-arbitration procedure.³

3 The respondent must be willing to arbitrate the issue which
4 is arbitrable. Criteria related to this factor are: (1) the
5 respondent must be willing to arbitrate and/or willing to waive
6 the procedural defense that the grievance is not timely filed, (2)
7 the dispute must be clearly arbitrable or at least arguably covered
8 by the contract and its arbitration provision, (3) a final and
9 binding procedure must exist.⁴

10 The dispute must center on the labor contract. The Collyer
11 decision emphasized that the prearbitral deferral process was
12 appropriate where the underlying dispute centered on the interpreta-
13 tion or application of the collective bargaining contract. This
14 doctrine was clearly stated in the NLRB's 1972 Teamsters, Local 70
15 decision:

16 In the Collyer case, we set forth the general considerations
17 which led us to the conclusion that arbitration is the preferred
18 procedure for resolving a dispute which could be submitted to
19 arbitration concerning the meaning of the parties' agreement;
20 we adhere to those views and we see no need to reiterate them
21 here. Our concern, rather, is the application of the Collyer
22 principles to the facts of this case.

23 . . . the resolution of this dispute necessarily depends
24 upon a determination of the correct interpretation of a
25 contract; and as said in Collyer, it is this precise type of
26 dispute which can better be resolved by an arbitrator than by
27 the Board.

28 . . . It is thus our considered judgment that when, as here,
29 the alleged unfair labor practices are so intimately entwined
30 with matters of contractual interpretation, it would best
31 effectuate the policies of the act to remit the parties in the
32 first instance to the procedures which they have devised for
33 determining the meaning of their agreement.⁵ (Emphasis
34 added.)

35 3. American Bar Association, The Developing Labor Law,
36 Cumulative Supplement 1971-78 (Washington, D.C.: Bureau of National Affairs,
37 Inc., 1976), p. 275-77.
38 1976 Supplement (Washington, D.C.: Bureau of National Affairs, Inc.,
39 1977), p. 136-37.
40 1977 Supplement (Washington, D.C.: Bureau of National Affairs, Inc.,
41 1978), p. 161-62.

42 4. Ibid. 1971-75 Supplement, p. 277-79; 1976 Supplement, p. 137; 1977 Supplement,
43 p. 162-163.

44 5. Teamsters, Local 70 (National Biscuit Company), 198 NLRB 552, 80 LRRM 1727
45 (1972).

1 In practical application, the factor requires that: (1) the
2 contract contain language expressly governing the subject of the
3 allegation, (2) the issue be deemed appropriate for resolution by
4 an arbitrator, (3) the center of the dispute be interpretation of
5 a contract clause rather than interpretation of a provision of the
6 Act.

7 Even where there has been language in the contract upon which
8 the dispute has been centered, the nature of the language has
9 affected whether or not the NLRB has deferred an unfair labor
10 practice complaint to arbitration. The NLRB has not deferred in
11 cases where: (1) the contract language on its face was illegal or
12 may have compelled the arbitrator to reach a result inconsistent
13 with the policy of the Act, (2) the respondent's argument constru-
14 ing the contract language to justify its conduct was "patently
15 erroneous," (3) the contract language was unambiguous (and there-
16 fore the special competence of an arbitrator was not necessary to
17 interpret the contract.)⁶

18 The above-cited criteria indicate that the NLRB's Collyer
19 doctrine would appropriately be applied to the unfair labor practice
20 allegations now under consideration.

- 21 1. There is no evidence that this dispute does not arise
22 within the confines of a stable collective bargaining
23 relationship.
- 24 2. There is no evidence that the parties' past or present
25 relationship would render the use of the grievance-arbi-
26 tration process futile.
- 27 3. Because the respondent cited the availability and appropri-
28 ateness of the contractually agreed upon grievance-arbitra-
29 tion procedure as an affirmative defense to this unfair
30

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32 ⁶ Op. Cit, American Bar Association, 1971-78 Supplement, p. 279-282; 1976 Supple-
ment, p. 137-138, 1977 Supplement, p. 163-164.